Supreme Court, U.S.
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No. 99-1185

IN THE

Supreme Court of the United States

MARK SELING,
Superintendent, Special Commitment Center,
Petitioner,

v.

ANDRE BRIGHAM YOUNG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

The Ninth Circuit remanded this case to the Federal District Court for an evidentiary hearing on whether the conditions of confinement rendered the Washington sexually violent predator statute punitive as applied to Mr. Young. The questions presented by this case are as follows:

Whether a court may find that the application of a "predator" civil commitment law violates double jeopardy, ex post facto, or due process protections, upon clearest proof that the law has been implemented in a pervasively punitive manner throughout its entire nine-year history.

Whether *Hudson v. United States* overturns more than 100 years of precedent reviewing the manner in which statutes are applied as a means of testing their constitutionality, in matters involving deprivations of personal liberty.

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STATEMENT OF THE CASE

This case comes before the Court on Certiorari from a decision of the Ninth Circuit Court of Appeals granting an evidentiary hearing in a habeas corpus challenge to incarceration under Washington's "Sexually Violent Predator" statute, Wash. Rev. Code 71.09.

(a) Proceedings in This Case

(i) State Court

Andre B. Young completed his sentence for a 1986 rape conviction in October, 1990. He had committed no new crime nor any recent overt act which would indicate either a mental disorder or dangerousness. Yet on the day he was to be released from prison, he was arrested on an *ex parte,* no-bail warrant and transferred to a different, maximum security prison. JA 26, ER 3.[1] He has been incarcerated ever since.

The State's petition alleged that Mr. Young suffered from a mental abnormality or personality disorder making him likely to re-offend in a sexually violent manner. JA-19.

Mr. Young was not permitted to challenge the conditions of confinement at the Special Commitment Center. (See Motion to Reconsider in State Supreme Court, JA 33 *et. seq.)* The jury did not consider less restrictive alternatives to confinement. The jury was required to find as an element of the "predator" petition that Mr. Young had been convicted of rape. JA-29 The jury returned a verdict finding Mr. Young a "sexually violent predator." The judge signed an order confining Mr. Young to the Special Commitment Center ("SCC"). SCC is located in a maximum security prison. It is run by the Department of Social and Health Services pursuant

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[1] The judge who signed the warrant interlineated the phrase "with no bail pending appearance before the court." ER 3. [ER refers to the Excerpt of Record filed in the Ninth Circuit Court of Appeals.] Mr. Young was not permitted to appear in court for nearly four months.

to a contract with the Department of Corrections (DOC). JA-30, JA-50. Mr. Young's commitment remains in effect until he is deemed to be "safe to be at large." JA-30.

Mr. Young appealed. In 1993, the state supreme court upheld his commitment, even while finding portions of the Statute unconstitutional under the Equal Protection clause. It found harmless a number of procedural and evidentiary errors, but ordered changes in the Statute on the basis of its "inherent judicial power," and ordered a new trial solely on the issue of less restrictive alternatives. *In re Young*, 122 Wn.2d 1 (1993), 857 P.2d 989. In 1994, a jury found that less restrictive alternatives were not appropriate.

(ii) Federal Court

Mr. Young filed a habeas corpus petition in 1994 alleging that his incarceration under the Statute was unconstitutional. JA-69. The Federal District Court granted the petition in 1995, finding that the statute violated due process, double jeopardy, and ex post facto protections. JA-91. The State appealed. While the appeal was pending in the Ninth Circuit, this Court accepted certiorari in *Kansas v Hendricks*, 521 U.S. 346 (1997). The Court of Appeals stayed Mr. Young's case, and, following the decision in *Hendricks*, remanded the case to the District Court. *Young v. Weston*, 122 F.3d 38 (9th Cir. 1997). The District Court, relying on *Hendricks*, reversed its earlier order. The Court did not address Mr. Young's request for an evidentiary hearing. Appendix to Petition for Certiorari (hereinafter Pet . App.), 15a; JA 92.

Mr. Young appealed. The Court of Appeals ruled that if he were able to prove that the conditions in the SCC were punitive as he had alleged, his commitment should be set aside as a violation of the double jeopardy and ex post facto clauses. App. Pet. 8a. The Court remanded the case to District Court for an evidentiary hearing. *Id.*, 13a. This Court granted the state's petition for certiorari. JA-152.

(b) Conditions of Confinement

The SCC always has been located within a prison. For its first eight years, the SCC was located within a maximum security prison in Monroe, Washington. In 1998, it was moved to McNeil Island Correctional Center (MICC), a prison on an island in Puget Sound. JA-128.

Washington denies persons committed under Wash. Rev. Code 71.09 the same status as other civilly committed persons. Wash.Rev.Code 71.09 precludes placing any 71.09 detainee "on the grounds of any state mental facility or regional habilitation center. "Wash. Rev. Code 71.09.060 (3). The Legislature authorized the placement of SCC in a prison. Wash. Rev. Code 71.09.060(3), 10.77.220. Pet. App. 108a, 121a.

The SCC depends upon the DOC for internal and external security, medical care, food services, visiting rooms, and library. JA-79. SCC detainees have fewer privileges and opportunities than do DOC prisoners for employment, structured leisure activities, education, law library access, visiting, and recreation. JA-54, 55, 87.

In 1992, an expert evaluator commissioned by the State found that the SCC employed "excessive physical security and rule related security" and "inconsistent application of disciplinary rules . . . " The evaluator described the absence of a less restrictive alternative community transition program as a "fatal problem". Washington Institute for Public Policy, *Review of Sexual Predator Program: Community Protection Research Project*, (Quinsey, V., 1992) at 5, ER 27. JA-83. Detainees are shackled and hand-cuffed any time they leave the facility, even though they are under constant armed guard. They are chained when they are transported to court. JA-8l.

(i) State court litigation

In 1994, a state trial court judge held that the conditions of confinement at the SCC violated substantive due process.

Detention of Campbell, King Co. No. 93-2-15348-1, JA-78.[2] The court based its conclusions on the lack of grievance procedures for inmate conduct violations, the use of a classification system which reflected neither security considerations nor treatment considerations, and lack of a comprehensive treatment program. The court found a "[l]ack of training and supervision of staff, resulting in verbal abuse of residents, a lack of trust and rapport between residents and staff, and a milieu counterproductive to treatment." JA-90. The Court found (JA-88):

> SCC staff have verbally abused residents, making derisive comments about residents' status or race . . . Staff have laughed during strip searches of residents . . . . Staff have requested a resident to harm other staff and have provided pornography to residents.

Verbal abuse of residents by SCC staff included use of epithets like "rapo," "pervert," "fucking punk," "niggers", "nigger lawyer," "sand niggers," and "sand monkeys." JA-59.

(ii) *Turay v.* Seling/*Sharp v. Weston/Seling*

In 1994, in a lawsuit filed by one of Mr. Young's fellow SCC detainees, a federal court jury found that the SCC had failed to provide treatment to residents. *Turay v. Weston,* (now entitled *Turay v. Seling*), No. C91-664WD, U.S. District Court for Western District of Washington. JA-64. The judge enjoined SCC administrators to provide constitutionally adequate treatment. Following SCC's initial failure to comply, the court appointed a Special Master.

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[2] The judge nonetheless denied Mr. Campbell's motion for release. See, *Detention of Campbell*, 139 Wn.2d 341, 345-6, 986 P2d 771, 773-775 (1999), petition for certiorari pending. The Washington Supreme Court upheld the order denying release. *Id.*, at 350.

More than four years later, in November, 1999, the court found the state in contempt for its continued failure to comply. See Order, Lodging of Petitioner-2.

The Special Master's reports and the Court's findings during the intervening years reflected the State's ongoing failure to provide constitutionally adequate treatment.

In 1997, the clinical director of the SCC admitted that conditions were "certainly more restrictive than a state hospital," and acknowledged an "ambience of incarceration." Seling Deposition ER 25 at 127-28. DOC staff performed daily "walk-throughs" of SCC. ER 25 Smith Deposition, App. B; 9/2/97 at 92-96; Seling Deposition, App. C, 9/3/97 at 133-35.

The SCC ombudsman, describing SCC's response to an incident in October, 1997, noted (ER 25):

> The punitive sanctions involved are unreasonable under these circumstances, and have no therapeutic purpose. The continued lockdowns, and extension of lockdown sanctions by therapy team staff, expose a counter-productive intention to exert physical and mental control over the residents not rationally related to this incident.

When the Monroe facility became over-crowded, SCC residents were simply housed in the prison within which SCC was located. ER 25, Seling Deposition at 42-43; Smith Deposition at 21. Such placements, the Special Master wrote,

> are clearly inappropriate for individuals in a mental health treatment program. This situation, along with the increased "walk-throughs" by DOC officers that began in June, demonstrates that SCC has not succeeded in insulating its program from the prison that surrounds it.

ER 25, Twelfth Report (9/17/97) at 8, emphasis added.

The district court in November, 1998, found that "The intertwining of MICC [McNeil Island Correctional Center] and SCC results in prison-like conditions and restrictions for SCC residents that have no therapeutic or security-based justification." JA-132. The court ordered SCC to take specific action to "reduce the negative effects" of SCC's dependence on the host prison. JA 136. A month later, Judge Dwyer adopted the conclusions of one expert witness (JA-147):

> . . . the Department of Corrections very clearly dominates physically, administratively, procedurally and psychologically the MICC and really in many significant ways encompasses the SCC. It is, for all intents and purposes, a prison. Feels like a prison, looks like a prison, and for the most part operates like a prison . . . SCC residents actually have fewer, not more, liberties in comparison to the Department of Corrections prisoners. . .

Treatment inadequacies continued as well. There was no clinical director for more than 15 months after the injunction order in 1994. JA-125. In November, 1998, there was "still no coherent and individualized treatment plan for each resident" despite the court's explicit direction (JA-131); staff were inadequately trained (JA-131), and there was a persistent failure to put into practice the plans which were presented to the court over the years. The Special Master remarked:

> The problem is that hardly any of the listed components have been developed . . . Similarly, no measures have been proposed for determining whether residents have achieved the many goals associated with each phase of the program. The document, then, while it is an excellent and ambitious plan, is essentially that—a plan for the institution's future. Unfortunately, it is not the program in place now. . .

Twelfth Report, ER 25, pp. 5-6.

Additional plaintiffs brought an action which was consolidated with *Turay*, and the state settled the damages claim in 1998. *Sharp v. Weston/Seling*, JA-119.

In 1998, court-appointed Resident Advocate, Stanley Greenberg, Ph. D., wrote (ER 25, App. A.):

> Because the SCC hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is designed and managed, either overtly or covertly, to punish and confine these men and woman to a life sentence without any hope of release to a less restrictive setting.

In November, 1999, the court found the state in contempt for its continued failure to comply with the injunction, and threatened monetary sanctions should the state fail to achieve substantial compliance within six months. Lodging of Petitioner-2. On May 5, 2000, the court, noting improvement, held the monetary sanctions in abeyance, but concluded:

> the defendants have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment.

Order, Lodging of Petitioner-17. The Court found that SCC still lacks "a systematic transition program with adequate LRA facilities", an aspect of treatment which has been "confirmed by all experts on both sides as a vital part of the professional minimum standards." *Id.*, at 13, 12.

The Court further found that "negative effects" of the DOC on SCC "continue to exist in some respects, and must be further reduced". The Court noted that while progress had been made because of the contempt order, "Shortfalls continue to exist in every area as the result of earlier failures to take the necessary steps. . . ." Lodging of Petitioner-10, 14, 16.

Prior to Judge Dwyer's contempt order, the Legislature had taken no action to improve conditions at SCC.

(c) Testimony About Mr. Young's Mental Condition

The state's evidence of Mr. Young's mental condition consisted of the testimony of one psychologist, Irwin Dreiblatt, who said it was his "diagnostic impression" [3] that Mr. Young suffered from a mental abnormality—a "paraphilia not otherwise specified", rape—, and a "personality disorder not otherwise specified", neither of which standing alone would support a conclusion that Mr. Young would be dangerous. By combining the two, however, he would say that Mr. Young was more likely than not to commit an unspecified crime of sexual violence in the indefinite future. Dr. Dreiblatt stated that he cannot predict whether a particular individual will reoffend within any particular time frame. ER 9, pp. 56, 160-3, 165-66. ER 10, p. 164. Dr. Dreiblatt relied in great part on Mr. Young's criminal convictions in reaching his conclusions.[4]

Dr. Dreiblatt acknowledged that "mental abnormality" is not a recognized psychological term, and that he, and each mental health professional called upon to apply it, needed to establish a "working definition." He acknowledged that the validity of classifying rape as a paraphilia is debated by experts in the field. ER 9, pp. 162,135; ER 10, pp.30, 111-112. Rape was not listed as a paraphilia in the third edition of the Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association (3d Rev. Ed. 1987) ("DSM III-R"), nor is it included in the DSM-IV (4th ed . 1994).

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[3] Dr. Dreiblatt expressed his conclusions as a "diagnostic impression" —as opposed to an actual diagnosis—based on a review of Mr. Young's records. ER 10, pp.35-6; ER 11, pp.41-2. Dr. Wise, a defense expert, explained that a "diagnostic impression" is just an educated guess. ER 14, pp. 146-7.

[4] Dr. Dreiblatt testified that he "felt there was a severe paraphilia" based "on the number of times that he acted and committed rapes." ER 10, 58. Mr. Young had four convictions from 1963, one in 1976, and one in 1986.

Mr. Young presented the testimony of four expert witnesses. Dr. Nancy Steele, a psychologist and expert in the treatment of incarcerated sex offenders, testified that the term "mental abnormality", as defined in the statute, could not be applied in "any consistent, fair, rational way by the psychiatric or psychological community." ER 13 pp. 77-81, 110-113. Dr. Christian Harris, a psychiatrist with extensive experience in forensic issues, stated that "[r]ape is a behavior . . . not a diagnostic category. " ER 15, pp . 90-98, 101-02. Dr. Barbara Schwartz, a psychologist and director of the state prison sex-offender treatment program, explained that rape should not be classified as a "paraphilia, not otherwise specified" because the scientific community has repeatedly rejected this proposed category. ER 12, pp. 5-8, 19, 28-29.[5]

Dr. Harris and Dr. Fred Wise[6] testified that predictions based on personality disorders do not withstand scientific scrutiny. ER 14, p. 168 ; ER 15, pp. 101, 108-09, 112.

Dr. Steele testified that ethical guidelines of the American Psychological Association obligate a psychologist to be exceedingly cautious in making a prediction of criminal behavior that will be used to imprison or release someone, and to limit that prediction by clearly specifying the acts being predicted, the time in which those acts will occur, and the factors upon which the prediction is based. ER 13, pp. 165-68.

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[5] While Dr. Steele believed that rape could be a paraphilia, she recognized the controversy surrounding that classification and declined to identify it as a cause of sexually criminal behavior. ER 13, pp. 148-9.

[6] Dr. Wise, a licensed clinical psychologist and a neuropsychologist, has been the department head for civil commitments at Harborview Medical Center and University Hospital since 1983. He evaluates detained persons and testifies for the state in civil commitment proceedings under the involuntary treatment act, Wash. Rev. Code 71.05. ER 14, pp. 133-40.

SUMMARY OF ARGUMENT

By remanding the case for a hearing on whether Mr. Young's conditions of confinement are punitive, the Court of Appeals correctly applied the "clearest proof" requirement to the assertion that the statute is punitive in effect.

When the legislature has indicated an intention to establish a civil penalty, this Court has inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. *Flemming v. Nestor*, 363 U. S. 603, 617-621 (1960). The state argues that a court cannot look beyond the language of a statute to its actual operation in determining double jeopardy and ex post facto violations. It contends that the state's failure to provide constitutionally and statutorily required treatment and conditions of confinement is irrelevant to a habeas corpus challenge. The state's position contradicts a long history of case law in this Court, which as recently as in *Garner v. Jones*, 146 L.Ed 2d 236 (2000) , has made clear that proof of the actual operation of a statute is relevant to ex post facto, double jeopardy, and due process analysis.

Hudson v. United States, 522 U.S. 93 (1997), does not apply to commitment or incarceration. The state's reliance on *Hudson* is misplaced. In cases dealing with deprivation of personal liberty, such as *Kansas v. Hendricks, supra,* and *Garner v. Jones, supra,* this Court considers the conditions of confinement under the statute as applied.

Despite obvious similarities, the Washington statute differs from the Kansas statute upheld in *Hendricks* in ways that invalidate Mr. Young's commitment and violate the due process, double jeopardy, and ex post facto clauses.

The fact that Mr. Young has been held in punitive conditions for nearly ten years is evidence of the punitive purpose and effect of the statute, and demonstrates that the treatment goal of the statute is a sham. The evidence in Mr.

Young's case demonstrates that "mental abnormality" as used in Washington is so vague as to violate due process, and further, that Mr. Young's alleged abnormality and personality disorder are constitutionally insufficient to support commitment.

Mr. Young has a right to habeas relief from unconstitutional incarceration.

The implementation of the Washington law makes clear that both of Justice Kennedy's concerns in *Hendricks* are real in Washington—treatment under the law is a sham, and the term "mental abnormality" as it is used in Washington is so vague and imprecise as to violate due process and to make the "predator" law a substitute for criminal sentencing.

In *Hudson*, this Court wrote: "Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction." 522 U.S. at 99. But no punishment is permissible under a civil commitment statute. If the state is using a commitment statute to punish a person, and the statute by its terms requires for its application a prior conviction, then the statute is unconstitutional as a violation of due process, double jeopardy, and ex post facto protections.

ARGUMENT

(1) This Court has consistently considered the administrative application of statutes in determining whether such statutes are punitive under the Double Jeopardy, Ex Post Facto, Due Process, and Bill of Attainder Clauses.

The State claims that under *Hudson*, Mr. Young's conditions of confinement are irrelevant to the case at hand, and that Mr. Young is barred from an "as applied" challenge to the statute no matter how punitive conditions at the Special Commitment Center might be. Pet. Br. 29. But in *Kansas v. Hendricks*, decided a few months before *Hudson*, this Court

upheld a similar statute only after a careful analysis of the conditions of confinement at the Kansas "predator" facility:

> The conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being 'punished.'

521 U.S. at 363.[7]

The state makes much of *Hudson's* disapproval of *United States v. Halper*, 490 U.S. 435 (1989), which reviewed the character of the sanction actually imposed. Pet. Br.18. But a true civil commitment cannot be a sanction or a penalty. *Hudson* on its facts addressed the imposition of civil penalties such as forfeiture or debarment decisions made by a banking agency. *Hudson* does not apply.

Since *Hudson*, this Court has continued to rely upon both legislative history and administrative application in determining whether statutes are unconstitutionally punitive. In *Garner, supra*, the Court denied and remanded an Ex Post Facto challenge *because* the lower court had failed to consider the actual application of the statute by an administrative agency, instead looking only at the possible results flowing from the statutory language:

[7] The state incorrectly claims that the *Hendricks* dissent "based its ultimate conclusion on factors inherent on the face of the law." Pet. Br. 22. Justice Breyer noted for the dissent that there was much evidence to support the conclusion that there was a lack of treatment in Kansas, 521 U.S. at 384.

> When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

U.S. at, 146 L.Ed. 2d 236, 247.[8] The Court explained:

> At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment to Rule 475-3-.05(2) created a significant risk of increased punishment. . . . The Court of Appeals was incorrect to say the Board's policies were of no relevance in this case.

Id. at 248. The Court concluded: "In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment." *Garner v. Jones*, 146 L.Ed 2d 236, 247.

The Ninth Circuit herein did exactly what *Garner* requires: remand the case for factual findings regarding the Statute as applied.

Garner is consistent with a long line of cases reviewing the application of statutes challenged as unconstitutionally punitive. In *Schall v. Martin*, 467 U.S. 253 (1984), for example, while finding that a juvenile pre-trial detention statute was not intended as punishment, the Court found it necessary to consider the conditions under which the juveniles were confined:

[8] The Courts use the same analysis of "punishment" for Ex Post Facto, Due Process, and Double Jeopardy purposes. For example, the Court in *Hudson*, a Double Jeopardy case, relied on the seven indicia of punishment listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), a Due Process case.

> Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that "[d]ue process requires that a pretrial detainee not be punished. [cite omitted] Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under ss 320.5(3)(b) are in fact compatible with these purposes.

467 U.S. at 269, citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Schall* mandates an "as applied" review when challenges to incarceration are involved:

> It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by case basis.

467 U.S. at 273. The Court concluded that pretrial detention of juveniles *in the particular case at hand* was non-punitive because "[t]he conditions of confinement . . . appear to reflect the regulatory purposes relied upon by the State." Id. at 270.

Similarly, in *Reno v. Flores*, 507 U.S. 292 (1993), the Court first rejected a facial challenge to a statute permitting detention of juvenile illegal aliens, then rejected an "as applied" challenge only upon satisfying itself that the detention featured decent and humane conditions and an absence of "shackles, chains, or barred cells." Id. at 16-17.

In *Minnesota ex rel Pearson v. Probate Court*, 309 U.S. 270, 276-77 (1940), the Court upheld the validity of a commitment statute, but warned of the special need for caution in commitment cases, where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration.

In *Sas v. Maryland*, 334 F.2d 506, 516—517 (4th Cir. 1964)[9], the Fourth Circuit relied on *Pearson* in its discussion of a "defective delinquent" commitment statute:

> . . . . Deficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.

The State claims that the Court in *Allen v. Illinois*, 478 U.S. 364 (1964), "focused on the statutory language rather than the actual daily conditions of confinement experienced by Allen." Pet. Br. at 22. To the contrary, the Court in *Allen* stressed the importance of both the language and the administrative application of the statute, and, in effect, criticized the petitioner for his failure to present evidence of the allegedly prison-like conditions:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center, and it certainly does not show that there are no relevant differences between confinement there and confinement in the other parts of the maximum-security prison complex. . . . We therefore cannot say that the conditions of petitioner's confinement themselves amount to "punishment" and

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[9] This Court granted certiorari in a later version of *Sas*, but later dismissed it as improvidently granted. *Murel et al. v. Baltimore City Criminal Court et al*, 407 U.S. 355 (1972), reviewing *Sas v. Maryland*, 295 F.Supp. 389 (Md. 1969), and *Tippett v. Maryland*, 436 F.2d 1153 (CA4 1971).

> thus render "criminal" the proceedings which led to confinement.

478 U.S. at 373-74.

Allen, Hendricks, Schall, Flores, and *Pearson* all make clear that while the legislature's stated intent is entitled to deference, legislatures may not mask punitive purposes with disingenuous phrasing. As the Court stated in *Cummings v. Missouri*, 4 Wall 277, 325, 71 US 277, 325 (1867)[10]:

> The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name . . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

The above—cited cases are consistent with over a hundred years of this Court's jurisprudence in such disparate areas as Free Speech,[11] Voting Rights,[12] Establishment[13] and Free

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[10] The Court restated *Cummings* five years ago in *U.S. Term Limits, Inc. v. Thornton*, 514 U. S . 779, 829 (1995) : "As we have often noted, " ' constitutional rights would be of little value if they could be . . . indirectly denied." *Harman v. Forssenius*, 380 U.S. 528, 540, 14 L. Ed. 2d 50, 85. S. Ct. 1177 (1965), quoting *Smith v. Allwright*, 321 U.S. 649, 664, 88 L. Ed. 987, 64 S. Ct. 757 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on constitutional protections. *Lane v. Wilson*, 307 U.S. 268, 275, 83 L. Ed. 1281, 59 S. Ct. 872 (1939); *Harman v. Forssenius*, 380 U.S. at 540-541.

[11] *Grosjean v. American Press Company*, 297 U.S. 233, 250 (1936); *United States v. Eichman*, 496 U.S. 310, 315 (1990); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ;

[12] *Gomillion v. Lightfoot*, 364 US 339 (1960); *Reno v. Bossier Parish School Bd.*, 137 L.Ed.2d 730 (1997).

[13] *Edwards v. Aguillard*, 482 US 578 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1987); *Bd. of Education of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994);

Exercise[14] of Religion, Fifth Amendment Takings,[15] Equal Protection,[16] right to an Impartial Jury,[17] and Self-Incrimination,[18] in all of which the Court has considered the application of statutes—as opposed to mere statutory language—in determining whether legislative enactments are constitutional. As the Court held in *Church of Lukumi v. Hialeah*, 508 U.S. 520, 534 (1993):

> We reject the contention. . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative.

Accord Bd. of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U. S . 546 (1994) ; *Turner Broadcasting System, Inc. v. SCC*, 512 U.S. at 645-46. And as stated in *Gomillion v. Lightfoot* , 364 US 339, 347 (1960): "Acts generally lawful may become unlawful when done to accomplish an unlawful end."

In *Yick Wo v. Hopkins*, 118 US 356 (1886), the court found a city ordinance unconstitutional despite its unexceptional language, upon finding that it was applied almost exclusively against persons of Chinese ancestry. The Court held:

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[14] *Church of Lukumi v. Hialeah*, 508 US 520 (1993);

[15] *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Eastern Enterprises v. Apfel*, 141 L.Ed.2d 451 (1998).

[16] *Yick Wo, supra; Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Missouri ex rel Gaines v. Canada*, 305 US 337 (1938); *McLaurin v. Oklahoma State Regents*, 339 US 637 (1950); *Sweatt v. Painter*, 339 US 629 (1950); *Washington v. Davis*, 426 US 229 (1976); *Arlington Heights v. Metro Housing Corp.*, 429 US 252 (1977); *Personnel Adin'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Columbus Bd. of Education v. Pennick*, 443 US 449 (1979)

[17] *Smith v. Texas*, 311 U.S. 128 (1940).

[18] *United States v. Ward*, 448 U.S. 242 (1980); *Allen v. Illinois*, 478 U.S. 364 (1986).

> the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws . . . .

118 U.S. at 373. (Emphasis added.) The Court stated that even a facially fair statute would be unconstitutional "if it is applied and administered with an evil eye and an unequal hand" *Id.* (Emphasis added.) *Accord, Gomillion, supra.*

In *Arlington Heights, supra,* 429 U.S. at 266, the Court, relying on *Yick Wo* and *Gomillion*, inferred improper legislative motive from the application of a statute:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action . . . may provide an important starting point.

There is nothing impossible or even unusual about requiring the district court on remand to decide whether Mr. Young has presented the "clearest proof" of pervasive, long-standing unconstitutional conditions.

The State is incorrect in claiming that Mr. Young's "as applied" challenge is beyond the bounds of inquiry.

(2) The Court should consider legislative history in conjunction with conditions at the Special Commitment Center in determining the constitutionality of Wash. Rev. Code 71.09.

As the Court wrote in *Arlington Heights, supra,* 429 U.S. at 268, legislators' statements can be critical in determining whether a statute was enacted with improper purpose:

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Such history is equally relevant in unmasking a legislature's intent to impose constitutionally impermissible punishment. As the Court noted in *United States v. O'Brien*, 391 U.S. 367, 383, n.30 (1968):

> The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute.

See, e. g., Kennedy v. Mendoz-Martinez , supra, 372 U.S. at 171-174. The Seventh Circuit summarized the applicable law in *Grossbaum v. Indianapolis-Marion Cty. Building*, 100 F.3d 1287, 1292 (7th Cir. 1996) (Easterbrook, J .):

> Motive is, of course, relevant to a number of constitutional claims. . . . [C]ases under the Establishment Clause or the Bill of Attainder Clauses may require courts to query the subjective intentions of legislators for possible illicit motives. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987) (legislature's "actual purpose" to promote religion invalidates statute); *United States v. Lovett*, 328 U.S. 303, 313-14, 66 S.Ct. 1073, 1077-78, 90 L.Ed.2d 1252 (1946) (circumstances of bill's passage showed that its purpose was to punish particular individuals).

In *Edwards v. Aguillard, supra*, for example, the Court viewed the results of a statute together with the statements of its chief proponent in overturning a law supporting the teaching of "creationism" in public schools. 482 U.S. at 587. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court noted the difficulty of proving legislative motivation, but found this difficulty overcome by the statements of delegates and later comments by historians. *See also Kiryas Joel, supra.*

The State cites *Kennedy v. Mendoza-Martinez, supra*, as authority for limiting review to the language of the Statute. Pet Br. at 17, 19. But the Court in *Mendoza-Martinez* refused to wear such blinders. After listing the seven well-known guidelines for reviewing statutory language, the Court held:

> Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive. (372 U.S. at 169.)

Here, too, the objective manifestations of the legislature's purpose indicate that Wash. Rev. Code 71.09 was intended to punish previously punished offenders. In this case, unlike *Martinez* and *Hendricks*, the Court has the benefit of ten years of evidence of unconstitutional application of the Statute to supplement the legislative history.[19] Precedent clearly requires consideration of both the application of the Statute and the legislative history behind it.[20]

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[19] The amici states argue that *Hendricks* addressed conditions of confinement "within the context of evaluating legislative intent." Amici Br. at12. Amici's intepretation is consistent with caselaw and with Mr. Young's argument. The *Hendricks* court found that conditions in the Kansas facility were non-punitive. But a finding that the conditions were punitive would have been powerful evidence of legislative intent to punish under the guise of civil commitment.

[20] This Court has never decided whether a punitive purpose alone is sufficient grounds to overturn a statute under the Ex Post Facto clause. *Lynce v. Mathis*, 519 US 433,442-3 (1997). Because Mr. Young alleges that RCW 71.09 is punitive in both purpose and effect, the question unanswered in *Lynce* can remain unanswered here.

The Court has found, however, that unconstitutional conditions alone can trump the benign intent of the legislature. In *Eastern Enterprises v. Apfel*, 524 U.s. 498, 528 (1998), for instance, this Court explored the constitutionality of mandatory pension legislation solely in terms of the effect of its administrative application:

(3) Legislative history clearly indicates that commitment under the Statute was designed to evade prohibitions against Double Jeopardy and Ex Post Facto laws.

There is little doubt that the primary motive behind the Washington statute was to keep sex offenders in prison.

While Mr. Young was serving his sentence, a number of shocking crimes occurred in Washington causing widespread public fear and outrage. Such crimes provoked criticism of the criminal justice system, which was viewed as lenient toward sex offenders. Concern was expressed over a "gap" in the criminal laws permitting dangerous sex offenders to be released into the community after completing their prison terms. There was a cry for tougher criminal penalties for sex crimes and for a legal mechanism to detain persons who were about to be released from criminal incarceration. *See Scheingold, et al.*, The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation, 15 U. Puget Sound L. Rev. 809, 816-18 (1992) (describing the mood of

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> Our decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience. . . . We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case.

Id. at 528-9 (emphasis added). *Accord Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

Eastern is closely analogous to the case at hand. Nothing in the language of the Coal Act led the Court to its finding of unconstitutionality. Nor was there a finding that Congress passed the act with improper motive. Conditions at SCC alone are enough to prove a violation of the Double Jeopardy, Ex Post Facto, and Due Process clauses.

Here, as in *Eastern*, the flaw in the legislation is found in the way it is applied by an administrative agency. The fact of Mr. Young's ten years of incarceration under punitive conditions must prevail, even if the legislature's hands were clean of improper purpose.

public outrage and the role of victims advocacy groups in the bill's passage). *See, also*, the District Court's first opinion in *Young v. Weston*, 898 F.Supp. 744, 746, n.l.

In response, Governor Booth Gardner commissioned the Task Force on Community Protection. The Task Force proposed the "Community Protection Act of 1990," subtitled "an act relating to criminal offenders." ER 22, III-1.

The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes? JA-15, Final Report at II-20. The Task Force emphasized: "[W]e must have the means to detain sexually violent predators whose confinement is not insured by our current laws." Final Report, IV-7. ER 22.

The Community Protection Act significantly enhanced criminal penalties for sex offenses in Washington. See Wash. Rev. Code 9.94A.310; -.320; and -.360(17). But lengthening future sentences did not satisfy the Task Force. David Boerner, chief drafter of the Act, realized that:

> [Longer sentences] could be applied only to crimes after the effective date of the reform because of the constitutional prohibition against retroactive increases in criminal punishment.

He added:

> I had no doubt that if the legislature was to extend the length of sentences previously imposed, the courts would find the legislation unconstitutional. *While the members of the Task Force could accept that legal judgment, they could not accept the result.*

Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. Puget Sound L. Rev. 535, 549-50 (1992) (emphasis added).

During legislative hearings Boerner testified:

> [U]p to now, under the criminal law['s] generally accepted principles, one can't impose penalties retroactively. People who are in the system now, in prison, being prosecuted now, must have their sentences and the length of those sentences determined by the law that was in existence at the time of their crime. And so we have a number of people who are under the old law who simply can't be charged under the criminal law.

Senate Committee Hearing, January 10, 1990, ER 17 at 1.

The Task Force saw its role as closing this "gap." JA-15. Boerner testified: "[the Task Force] did not begin with the intent to create a civil commitment system that would address the problem." ER 17, supra, at 1. The Task Force proposed the civil commitment of "sexually violent predators" under a new scheme wholly separate from Washington's traditional mental illness statute, the "Involuntary Treatment Act", Wash. Rev. Code 71.05, *et seq.*, explaining:

> Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its definitions. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable. The Task Force concluded that existing laws do not offer a sufficient safety net for confinement of sexually violent predators who meet these end points. The Task Force believes a safety net must be created to reduce future acts of violence.

Final Report, ER 22 II-21, emphasis added. The Task Force was clear about its purpose in proposing 71.09: to keep criminals locked up after the conclusion of their sentences.

(4) Legislative inaction in the face of persistently unconstitutional administrative application of a statute is proof of unconstitutional purpose in passing the statute.

The Statute prohibits the use of State mental hospitals for the treatment and confinement of "civilly committed" sex offenders. Wash. Rev. Code 71.09.060(3) . The consequence, all too foreseeable, was Mr. Young's detention in a punitive, non-therapeutic environment for ten years. As the Court held in *Columbus Bd. of Education v. Pennick*, 443 US 449, 465 (1979):

> Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' (Citation no. omitted.)

The consequences became evident to the legislature in 1994, when Judge Armstrong found the conditions at the Special Commitment Center unconstitutional, JA-89, and Judge Dwyer enjoined the State to correct the deficiencies. JA-65-68. Both judges cited the crucial need for conditional release programs. JA-67,90. The legislature responded, in 1995, by passing amendments to the Statute making it harder to qualify for conditional release, but without creating, funding, or even suggesting the creation of release programs. Wash. Rev. Code 71.09.090-.098. App.Pet. 124a et. seq. *See infra*.

In *United States v. City of Yonkers*, 96 F.3d 600, 614 (2nd Cir. 1996), the court found intent to segregate where the State knew that schools were segregated and did nothing to fix the problem. As this Court held in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980):

> [L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation.

After sixteen orders in five years from Judge Dwyer, after the award of damages in *Sharp*, there can be no claim of "lack of prescience" in the case at hand. The legislature's silence can only betoken permission to punish SCC residents.

(5) *Hudson v. United States* is inapplicable to cases involving incarceration.

The State's argument requires a finding that *Hudson* overturned over a century of precedent, *sub-silentio*. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) provides a far more rational explanation of the Court's unwillingness to apply double jeopardy/ex post facto analysis to the civil fines at issue in *Hudson*: another constitutional protection made it unnecessary. As the *Eastern* majority pointed out, deprivations of property and deprivations of freedom are subject to different kinds of constitutional review:

> Our Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* and Takings Clauses. *Landgraf, supra*, at 266, 128 L.Ed.2d 229, 114 S.Ct. 1483. In *Calder v. Bull*, 3 Dall 386, 1 L.Ed. 648 (1798), this Court held that the *Ex Post Facto* clause is directed at the retroactivity of penal legislation, while suggesting that the Takings Clause provides a similar safeguard against retroactive legislation concerning property rights. See id. at 394, 1 L. Ed. 648 (Chase, J.) ('The restraint against making any *ex post facto laws* was not considered, by the framers of the constitution, as extending to prohibit the depriving of a citizen even of a vested right to property; or the provision, 'that private property should not be taken for public use, without just compensation, was not necessary.')

Id. at 533.

Hudson involved only property rights, a subject not contemplated under the ex post facto or double jeopardy clauses. *Eastern*, 524 U.S. at 533. As *Hudson* explained:

> The Eighth Amendment protects against excessive civil fines, including forfeitures. . . . The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and "nonpunitive" penalties.

522 U.S. at 103. Like his counterpart in *Eastern*, Mr. Hudson had no need of Ex Post Facto/Double Jeopardy protection; he had other remedies available. The sanctions against him—a fine and a professional debarment—were " 'certainly nothing approaching the 'infamous punishment' of imprisonment.' " *Hudson*, 522 U.S. at 104, quoting *Flemming, supra*, 363 U.S. 603, 617.

Flemming found that "[n]o affirmative disability or restraint is imposed" in the denial of social security benefits to deported Communists. *Id. accord, Harisiades v. Shaughnessy*, 342 U.S. 580 (1951). The Court in *Hudson* similarly relied "on the historical support for the notion that [in rem] forfeitures are civil and thus do not implicate double jeopardy." 522 U.S. at 102, citing *United States v. Ursery*, 518 U.S. 267 (1996).[21]

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[21] The State cites Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807 (1997) in its brief as a source for its narrow reading of the Double Jeopardy clause and broad construction of *Hudson*. But even Prof. Amar distinguishes between monetary fines and imprisonment for Double Jeopardy purposes. He explains:

> It is, after all, precisely the obvious contrast between "life and limb" on the one hand, and mere "money," on the other, that drives the drama of Shakespeare's great meditation on law, lawyers, and hyperliteralism, *The Merchant of Venice*.

Id. at 1811.

The Court distinguished between civil and criminal forfeitures in *United States v. Bajakanian*, 524 U.S. 321, 331-32 (1998), another post-Hudson case:

> Traditional in rem forfeitures were . . . not considered punishment against the individual for an offense . . . . Recognizing the nonpunitive character of such proceedings, we have held that the Double Jeopardy Clause does not bar the institution of a civil, in rem forfeiture action after the criminal conviction of the defendant.

But the *Bajakanian* court had "little trouble" finding that even forfeiture would constitute criminal punishment if it "is imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony." *Id.* at 328.

Because only property was involved, there was no need for the Court in *Hudson* to look beyond the face of the Statute in assessing its constitutionality under the Double Jeopardy clause. [22] Here, on the other hand, the sanction (a) is more

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Amar discusses the problem of "a criminal wolf disguised in civil sheep's clothing" in his analysis of *Dept. of Revenue v. Kurth Ranch*, 511 U.S. 767, 888 (1994), suggesting the remedy lies in Due Process rather than the Double Jeopardy clause. 106 Yale L.J. at 1834. Under either clause, punishment of Mr. Young pursuant to allegedly civil proceedings remains unconstitutional.

[22] Recent federal case law leads to the same conclusion. The *Hudson* rule has been applied almost exclusively to cases of fines, forfeitures, and debarments. In *S.A. Healy v. Occupational Safety & Health Review*, 138 F.2d 686, 688 (7th Cir. 1998, the court found that civil fines imposed under the Occupational safety and Health Act were non-punitive under the double jeopardy clause, holding:

> The exaction is financial . . . and money penalties have not been viewed historically as criminal punishment. *Hudson*, — U.S. at —, 118 S.Ct. at 495. . . . .

Similarly, in *United States v. Beaty*, 147 F.3d 522, 525 (6th Cir. 1998) the court cited the "affirmative disability" / "infamous punishment" language of *Nestor v. Flemming* in finding that a tax on wagering did not violate double jeopardy.

akin to "the infamous punishment of imprisonment" than to a civil forfeiture, (b) requires conviction of an underlying felony, and (c) is imposed upon culmination of a criminal sentence. *Hudson* is simply inapplicable.[23]

(6) Due Process Does Not Permit Mr. Young To Be Punished Under a Commitment Statute

The State suggests that even if Mr. Young is being punished, his punishment is neither successive nor ex post facto. But the State fails to explain how Mr. Young can constitutionally be subject to any punishment under the Due Process clause. *See Youngberg v. Romeo*, 457 U.S. 307, 314 (1982). In *Hudson v. United States, supra*, the Court relied on *Kennedy v. Martinez-Mendoza, supra*, in determining whether a civil fine could be considered punitive under the Double Jeopardy clause. But *Mendoza-Martinez* is not a

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The only applications known to respondents of the *Hudson* facial relationship language to actual confinement are *United States v. Mayes*, 158 F.3d 1215 (11th Cir. 1998); and *New Jersey v. Black*, 153 NJ 438, 710 A.2d 428, 432 (1998), both finding double jeopardy analysis inapplicable to the loss of "good time" pursuant to prison discipline. Both cases analyze loss of good time as an administrative act pursuant to lawfully imposed punishment, rather than as separate punishment. No one challenged the State's power to impose a criminal sentence on either Mayes or Black. By contrast, there are no permissible grounds for any sanction in the case at hand.

[23] *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*,—U.S.—145 L. Ed. 2d 610 (2000), leads to the same result through a slightly different analysis. There, the Court noted that Congress included "deterrence and retribution" among the purposes for civil fines to be imposed under an environmental protection statute. No mention was made of double jeopardy. But deterrence and retribution are "the two primary objectives of criminal punishment." *Hendricks*, 521 U.S. at 361-2. Civil laws with punitive purpose or effect were described as permissible in *Friends of the Earth* and impermissible *in Hendricks, Schall*, and the list of cases cited *supra*. There is only one way to distinguish among them: *Friends of the Earth* involves only monetary penalties, whereas *Hendricks et al.* involve deprivation of physical liberty.

double jeopardy case; the Court found the statute therein unconstitutionally punitive as a matter of due process. Similarly, in *Schall v. Martin, supra; Reno v. Flores, supra;* and *United States v. Salerno*, 481 U.S. 739 (1987), the Court stressed that punitive conditions could render otherwise permissible legislation unconstitutional under the due process clause. Even though neither Double Jeopardy nor Ex Post Facto violations were alleged, the allegedly punitive nature of the statutes therein remained crucial in all three cases.

"At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Prison-like conditions, with "no therapeutic or security-based justification" JA-132, cannot be reasonably related to the purpose of commitment.

This Court may not need to reach the issue of whether the Statute constitutes double jeopardy as applied. If its application violates the due process clause, Mr. Young's commitment must be overturned.

(7) This Court distinguishes between incidental and pervasive illegality in determining whether statutes are rendered unconstitutional by the administration thereof.

The State raises the spectre of statutes being overturned on the basis of short periods of punitive application. Pet. Br. at 29. The State's concern is inapplicable in the case at hand: as both federal and state court decisions show, conditions at SCC have never been adequate during the nearly ten years of Mr. Young's commitment.

A state institution might slip below constitutional standards during troubled times, or, as in *Kansas v. Hendricks*, might be too new to permit assessment of compliance with constitutional requirements. 521 U.S. at 367-68. Here, on the other hand, the Ninth Circuit found that if conditions have been as bad as Mr. Young claims for as long as Mr. Young

claims, the Statute itself is unconstitutional as applied to Mr. Young. *Young v. Weston, supra*, 192 F.3d at 873-76.

The courts are well able to distinguish between passing and pervasive unconstitutionality. *Farmer v. Brennan*, 510 U.S. 825, 846, n.9 (1994), for instance, clearly distinguishes fleeting constitutional failings from the kind of entrenched resistance exhibited by the State herein:

> If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness . . . . At the same time, even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation.

Here, the pervasive unconstitutionality of conditions at SCC was clearly and repeatedly established by the District Court in *Turay v. Seling, supra*. The State cannot plausibly claim lack of awareness. The State remains obdurate, more than five years after the issuance of the injunction, despite sixteen orders from Judge Dwyer detailing its failure to rectify unconstitutional conditions at SCC .[24]

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[24] Any meaningful progress has been due to the District Court's contempt order and the threat of sanctions. *See Turay v. Seling, supra*, Findings, Conclusions, and Order dated November 15, 1999, holding the State in contempt and delaying imposition of sanctions. As the District Court judge in *Turay* observed:

> The chief cause of non-compliance, as found in the November 15, 1999 order, has been the State's failure to provide needed resources. The past few months have seen significant changes for the better.

Pet. Lodging, Order May 5, 2000, at 10. The court wrote:

(8) Contrary to the State's argument, the scope of the Double Jeopardy clause is not limited to protection against successive trials.

The State argues:

> The historic purpose of the double jeopardy clause is to protect persons from a second trial for the same offense. This purpose is given effect by a facial inquiry, not an 'as applied' test.

Pet. Br. at 12. This assertion is refuted by *North Carolina v. Pearce*, 395 U.S. 711, 717-18 (1969):

> "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."

Quoting *Ex parte Lange*, 18 Wall. 163, 168 (1873). *Accord, Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *One Lot Emerald Cut Stones*, 409 U.S. 232, 237 (1972); *Hudson*, 522 U.S. at 102.

The State's reductionist view of Double Jeopardy leads to a second error: its claim that Double Jeopardy protection is unavailable after trial. Pet. Br. at 25. Mr. Young argued before trial that the conditions of confinement rendered Wash. Rev. Code 71.09 unconstitutional. ER 45. His request for an evidentiary hearing was denied by both the trial court and the Washington Supreme Court. JA-32. Even if, as the State claims, Double Jeopardy challenges are limited to pre-trial proceedings, Mr. Young clearly raised the issue in a timely fashion.[25]

"There is no doubt that this effort was caused by the contempt order." *Id.* The State thus cannot show that it would not "revert to obduracy" should Judge Dwyer lift his injunction.

[25] The Ninth Circuit found that "the Washington state courts did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center." *Young v. Weston, supra*, Pet. App. 11a.

The completion of trial is no bar to Double Jeopardy protection. In *Pearce, supra*, for instance, the Court found a Double Jeopardy violation where a trial court failed to credit the petitioner with "good time" upon re-sentencing following appeal, even though no one challenged the validity of petitioner's second trial. Successive punishments are unconstitutional whether or not they follow successive trials.

Finally, the State's argument ignores the separate applicability of the Ex Post Facto clause. This Court has found Ex Post Facto violations where either legislatures or administrative agencies have sought to reduce a prisoner's earned good time. *Weaver v. Graham*, 450 U.S. 24 (1981); *Lynce v. Mathis*, 519, U.S. 443 (1997); *see also Garner, supra*.

The punitive incarceration suffered by Mr. Young for nearly ten years in effect is an increased punishment for the crime which served as the predicate offense for his "commitment". This violates the ex post facto clause. See *Weaver v. Graham*, 450 U.S. 24, 31 ("The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date"), accord, *Carmell v. Texas*, 146 L. Ed. 2d 577 (2000).

If Mr. Young is being punished, the Statute is unconstitutional as applied, whether the challenge was raised before or after trial.

(9) The State Cannot Rescue the Statute by Blaming the Executive Branch for the Unconstitutional Application thereof.

The State warns against permitting a rogue executive branch to stymie the benign intent of the legislature. The state cites no authority for its claim that its attorney general can defend the legislature against depredations by the executive

branch, nor for the claim that an administrative agency of the State is somehow a separate entity from the State itself.[26]

The Attorney General and the Department of Social and Health Services are servants of the same sovereign: the State of Washington. *State v. Dupard*, 93 Wn. 2d 268, 273, 609 P.2d 961 (1980), *Thompson v. DOL*, 138 Wn. 2d 783, 794, 982 P.2d 601 (1999). As this Court stated 121 years ago:

> Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning.

Ex parte Virginia, 100 U.S. 339, 347 (1879); *Neal v. Delaware*, 103 U.S. 370, 397, 26 L. Ed 567, 574 (1881).

The legislature is aware of the problems at SCC, but has done nothing to fix them. To the contrary, while the Federal Court Special Master and virtually all other experts have criticized SCC's failure to establish community treatment resources, the legislature in 1995 eliminated the possibility of release to less restrictive alternatives prior to in-patient commitment, making it far more difficult for residents to win conditional release of any kind. Compare previous and current Wash. Rev. Code 71.09.020(1); 71.09.090; 71.09.092;

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[26] The State's sole source for its argument is *Kendall v. United States ex re Stokes*, 371 U.S. 524 (1938). But *Kendall* holds only that the executive has no power to nullify duly enacted legislation. Here, unlike *Kendall*, the executive makes no claim of power to override the law. The Attorney General has appealed Judge Dywer's recent orders. JA-140. The state made what the court described as a "remarkable argument" that SCC must have "an interface" with DOC. JA-146. The state should not be heard to blame and exonerate its own agency for the same conduct in two separate proceedings.

71.09.094; *Detention of Young*, 857 P.2d 989 (1993); *Detention of Brooks*, 94 Wn.App. 716, 973 P.2d 486 (1999); *Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). By contrast, the legislature has done nothing over the past ten years to address the inadequacies of the SCC treatment program, the prison-like conditions of confinement, or the unavailability of actual community-based aftercare.[27] Not even a federal injunction has spurred the legislature to change. Only when the federal court threatened drastic financial sanctions did the legislature appropriate additional money for the SCC. It is unclear whether the additional funds will make a significant difference.

Under Washington law, the legislature's failure to amend a statute following judicial construction thereof demonstrates approval of the judicial construction. *State of California v. State Tax Coinmn'n*, 55 Wn.2d 155, 158, 346 P.2d 1006 (1959). There is no reason to view the legislative response to the executive's application of a statute in any different light. DSHS cannot be seen as a rogue agency thwarting legislative will, since the legislature has tacitly endorsed the agency's administration of the Statute—through ten years of silence.

(10) Mr. Young does not suffer from a recognized disorder sufficiently precise to serve as grounds for commitment.

(a) *Hendricks* does not reduce constitutional requirements for commitment.

While the Court in *Hendricks* found that "the term 'mental illness' is devoid of any talismanic significance," 138 L.Ed.2d at 513, it did not reject previously established limits

[27] Under Wash. Rev. Code 71.05.025, persons committed under the Involuntary Treatment Act, the traditional civil commitment statute, have access to all of the community treatment services offered under Wash. Rev. Code 71.24, the Community Mental Health Services Act. By contrast, the legislature has failed to establish any community services for persons committed under Wash. Rev. Code 71.09.

on the State's civil commitment powers. The Court explained: "we have never required State legislatures to adopt any particular *nomenclature* in drafting civil commitment statutes." *Id.* (emphasis added). *Hendricks* thus gives the States broad leeway in describing mental disorders subject to commitment, but does not lower the standards established in *Addington v. Texas*, 441 U.S. 419 (1979); and *Foucha v. Louisiana*, 504 U.S. 71 (1992).

Hendricks is fact-specific. Rather than considering all possible applications of the Kansas statute, the Court limited its review to the record in Mr. Hendricks' case.[28] It therefore took great care in analyzing Mr. Hendricks' mental problems. 521 U.S. at 359. The majority emphasized the undoubted validity of his diagnosis and his undoubted inability to control himself:

> The mental health professionals who evaluated
>
> > Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder. See, *e.g.*, [American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM)] at 524-525, 527-528. Hendricks even conceded that, when he becomes "stressed out," he cannot "control the urge" to molest children. App. 172. This admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.

Id.[29] After reviewing prior case law, the Court concluded:

[28] In all but First Amendment cases, the Court limits vagueness review to the particular facts of the case presented. *See United States v. Mazurie*, 419 U.S. 544, 42 L.Ed.2d 706, 95 S.Ct. 710 (1975).

[29] This language equating disorder with lack of volitional control restates the rule of *Pearson, supra*, where the Court upheld a statute allowing for civil commitment of sexual offenders precisely because it

> To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria.

Id. (emphasis added).

But as Justice Kennedy observed in his concurrence:

> if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

521 U.S. at 373. In other words, while the states are granted substantial freedom to craft their own terms and definitions of mental disorder, they must use "comparable criteria" for commitment to be constitutional. 521 U.S. at 358: [30]

> These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control.

(b) Mr. Young's alleged condition is not accepted within the psychiatric profession.

Mr. Young's alleged condition is not comparable to the criteria found acceptable for commitment in *Hendricks* or the cases cited therein. The State's expert diagnosed Mr. Young with "paraphilia not otherwise specified, rape," (ER 9, 163) a diagnosis unmentioned in the DSM and which, as the expert admitted, is controversial within the scientific community. ER 10, p.30. Mr. Young's commitment is based on an unrecognized diagnosis with unexplained consequences. It is

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required "*an utter lack of power to control* . . . sexual impulses." 309 U.S. at 274. (Emphasis added.)

[30] In the other cases cited in *Hendricks*, the individual was similarly diagnosed with a "serious disorder" accepted as such by the scientific community. In *Heller v. Doe*, 509 U.S. 312 (1993), *supra*, for example, the disorder was mental retardation. In *Allen*, *supra*, the statute required a finding of mental illness.

"too imprecise a category to offer a solid basis for concluding that civil detention is justified." *Hendricks* (Kennedy, J. concurring), *supra* at 373.

(c) Mr. Young's alleged Personality Disorder is Constitutionally Insufficient Basis for Commitment.

In *Foucha v. Louisiana, supra*, the Court found personality disorders insufficient grounds for civil commitment, even in the presence of proven dangerousness. The Court in *Hendricks* paid little attention to personality disorders; no one claimed that Mr. Hendricks had one. The Court did not purport to overrule *Foucha*.

But even if certain personality disorders were constitutional grounds for commitment, Mr. Young's vaguely defined alleged "personality disorder not otherwise specified" (NOS) would not qualify. The DSM-IV lists ten specific personality disorders—and a non-specific category, "personality disorder not otherwise specified." The ten specific disorders are diagnosed using strict criteria. Antisocial Personality Disorder, for instance, requires proof of any three of fifteen behavioral criteria before age fifteen, and three of seven thereafter. DSM-IV at 90, 649-650. Five of nine criteria must be met for diagnosis of Histrionic or Narcissistic Personality disorders. *Id.* at 657-58, 661.

Diagnosis of Personality Disorder NOS requires no more than

> the presence of features of more than one specific Personality Disorder that do not meet the full criteria for any one Personality Disorder ('mixed personality'), but that together cause clinically significant distress or impairment in one or more important areas of functioning (e.g., social or occupational." *Id.* at 673.

This diagnosis could be applied to most people with a criminal record. It does not "adequately distinguish" Mr. Young from other wrongdoers. *Hendricks* at 360.

(d) The State did not show that Mr. Young lacks volitional control.

The State further failed to establish the requisite element of lack of volitional control. As the DSM stresses:

> the fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder. Even when diminished control over one's behavior is a feature of the disorder, having the diagnosis in itself does not demonstrate that a particular individual is (or was) unable to control his behavior at a particular time.

DSM-IV at xxiii. Neither the expert nor the trial court made findings regarding Mr. Young's ability to control himself.

Mr. Hendricks suffered from a well-established disorder which made him unable to control himself. Mr. Young was diagnosed with an unrecognized mental abnormality and with a personality disorder so broadly defined that it could be applied to any and all criminals, which, together but not separately, allegedly made him likely to re-offend. There was no mention of the effect of these problems on his ability to exercise self-control.

The Court in *Hendricks* determined only that Mr. Hendricks was properly committed. It did not automatically validate all "predator" commitments. The record herein shows that Mr. Young's commitment did not meet constitutional requirements.

(11) Washington's law does not satisfy the standards for constitutionality described in Hendricks.

The State claims that the Washington statute and the "predator" law approved in *Hendricks, supra*, are "identical in all relevant respects." Pet. Br. 2. But Wash. Rev. Code

71.09 differs from the Kansas statute with respect to many of the factors relied upon by the *Hendricks* majority. These differences mandate the conclusion that 71.09 is punitive and thus violates the due process, ex post facto and double jeopardy clauses.

As Justice Kennedy pointed out in his concurring opinion, the majority in *Hendricks* "gives a full and complete explanation why" the Kansas statute is not punitive under the facts presented. But as he cautioned: "All this, however, concerns Hendricks alone." 521 U.S. at 371.

The majority identified factors supporting the facial validity of the Kansas statute (*Id.* at 368):

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.

Washington has not "disavowed any punitive intent," does not provide strict procedural safeguards, does not "permit[] immediate release upon a showing that the individual is no longer dangerous or mentally impaired," and has neither "directed that confined persons be segregated from the general prison population" nor afforded them the same status as other civilly committed persons. Unlike the Kansas statute, Wash. Rev. Code 71.09 must be found punitive.

1. Washington has not disavowed punitive intent.

Like its Kansas counterpart, Wash. Rev. Code 71.09 is labeled "civil" by the legislature. But as noted in *Hendricks*, a "civil label is not always dispositive." 521 U.S. at 515 (citing

Allen v. Illinois, 478 U.S. at 369). The Court in *Hendricks* looked beyond the label and examined (1) whether commitment under the law implicates either of the two primary objectives of criminal punishment: retribution or deterrence; (2) whether commitment is dependent on a finding of scienter;[31] and (3) whether conditions of confinement under the law indicated a punitive purpose. *Id.* at 362-3.[32]

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[31] The *Hendricks* Court noted that scienter is "customarily an important element in distinguishing criminal from civil statutes." 521 U.S. at 362. Under Washington law, however, the concept of "scienter" provides little help. "Washington courts have consistently rejected the argument that intent or knowledge is an element of rape." *State v. Brown*, 78 Wn.App. 891, 894, 899 P.2d 34 (1995). If scienter is unnecessary to prove the underlying criminal offense required for commitment under RCW 71.09, its absence or presence does nothing to distinguish between the criminal law and the allegedly non-criminal commitment statute.

Scienter is required to prove the underlying criminal offense, where the State relies on RCW 71.09.060(b), regarding persons incompetent to face criminal charges. "The presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct." *Carter v. United States*, — U.S. — (2000), quoting *United States v. X-Citement Video*, 513 U.S. 64, 71 (1994). In other words, scienter has more to do with the character of the act than with the state of mind of the perpretrator. None of the offenses described in RCW 71.09.020(6) constitute "otherwise innocent conduct" even in the absence of mens rea. Anyone who engages in such conduct, even if incompetent, therefore does so with scienter.

[32] Civil commitment may not be used to punish. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). If the Statute is punitive, it is unconstitutional under the Due Process, Double Jeopardy, and Ex Post Facto clauses. *See supra*. The *Hendricks* factors are thus unlike the factors listed in *Kennedy v. Martinez-Mendoza*, 372 U.S. 144, 168-169 (1963). Whereas none of the *Kennedy* factors is controlling on the issue of whether a statute violates the Double Jeopardy clause, *Hudson, supra*, 522 U.S. at 101, punitive intent alone is enough to doom the Statute in the case at hand as a violation of due process.

a. Commitment under Wash. Rev. Code 71.09 implicates the goals of retribution and deterrence.

The Court in *Hendricks* held:

> The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes.

Id. at 362. The Court found that in Kansas, a prior conviction was not an "element" of the charge of being a "sexually violent predator." 521 U.S. at 370. Therefore, it held, the prohibition against double jeopardy did not apply.

Under Wash. Rev. Code 71.09, by contrast, a prior conviction or other proof of commission of a "sexually violent offense" is a predicate element of commitment. A petition under the Statute must allege that the respondent was convicted of a "sexually violent offense." Wash. Rev. Code 71.09.030.[33] Commitment cannot occur under the Statute absent proof beyond a reasonable doubt that the individual committed a sexually violent offense. Wash. Rev. Code 71.09.060. In *Detention of Twining*, 77 Wn. App. 882, 888, 894 P.2d 1331 (1995) , the Washington Court of Appeals noted that "the Legislature requires that the suspected sexual predator . . . must have been convicted or charged with a

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[33] The only exceptions are for persons charged with sexually violent crimes and either found incompetent or acquitted on grounds of insanity. *Id.* If the person has been found incompetent, the State must prove the predicate offense at the commitment trial. "[T]he rules of evidence applicable in criminal cases shall apply, and all constitutional rights available to defendants at criminal trials, other than the right not to be tried while incompetent, shall apply." Wash. Rev. Code 71.09.060.

The legislature did not disavow punitive intent by including incompetents within the scope of the bill. Rather, by enumerating the specific offenses for which even incompetents could be committed, the legislature made clear its intent to punish even those who are not otherwise subject to criminal punishment.

crime of sexual violence. RCW 71.09.020(1). " *Accord In re Henrickson*, Wn.2d __, n.2 (2000).

In Mr. Young's case, the prosecutor's charging document alleged that Mr. Young had been convicted of a specific sexually violent offense, the sentence for which was about to expire. JA-l9. The court instructed the jury that to find Mr. Young a sexually violent predator they must find "each of the following elements" beyond a reasonable doubt, including that he had been "convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree . . . . " Instruction No. 8, JA-29.[34]

An element, in the criminal context, is a "fact necessary to constitute the crime" and must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The Washington legislature has made commission of the prior crime a fact which must necessarily be proved beyond a reasonable doubt in order to commit someone as a "predator." There can be no doubt, under *Winship*, that proof of the prior crime is an element necessary for commitment under the Statute, rather than a mere fact used for evidentiary purposes. Unlike the Kansas statute, the Washington statute makes commission of a sexual offense "the basis for invoking the commitment proceedings." *Hendricks*, 521 U.S. at 370.[35]

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[34] In another case, respondent Jerry Sharp obtained a dismissal of the "predator" prosecution against him when his prior conviction was reversed on appeal. Assistant Attorney General Sarah Sappington provided a declaration in Mr. Sharp's case, stating that when the court of appeals reversed Mr. Sharp's convictions for sexually violent offenses, "the State was required by law to dismiss its petition." Brief in Opposition to Certiorari, Appendix F. The trial court dismissed the predator petition against him. Brief in Opposition, Appendix G.

[35] In *Jones v. United States*, 526 U.S. 227, 235 (1999), the Court noted that "with perhaps one exception," "Congress had never clearly made prior conviction an offense element *where the offense conduct, in the absence of recidivism, was independently unlawful*." (emphasis added), citing *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998). In other words, proof of the prior offense is not defined as an element as long as there are independent grounds to convict without it. Here, by contrast, neither Mr. Young's mental condition nor his alleged dangerousness is independent grounds for commitment under the statute, absent proof of the prior offense. Wash. Rev. Code 71.09.060

b. Wash. Rev. Code 71.09 was intended as a deterrent.

The *Hendricks* court concluded that the Kansas law could not be considered deterrent in nature because:

> Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior.

521 U.S. at 362. As noted above, commitment under the Washington statute does not require proof of a lack of volitional control. The *Hendricks* presumption of non-deterrent purpose therefore does not apply.

The conditions of confinement outlined above certainly demonstrate deterrent effect and purpose. Potential sex-offenders in Washington now know that an offense leads not only to prison, but also to a second, indefinite imprisonment after completion of a prison term.

2. Washington has not "provided strict procedural safeguards" or "permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired."

a. The Failure to Provide for an Annual Re-Commitment Trial Demonstrates the Punitive Purpose of Wash. Rev. Code 71.09.

The Court in *Hendricks* reasoned that the Kansas statute could not be considered punitive, in part because:

> Commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be

> incapacitated pursuant to a single judicial proceeding is one year. [citation omitted.] If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for initial confinement. [*Id.* at 516.] [36]

Wash. Rev. Code 71.09 is not merely "potentially indefinite;" it is explicitly so. The Washington Court held in *Detention of Petersen*, 138 Wn.2d 70, 81, 980 P.2d 1204 (1999):

> Our sexually violent predator statute unequivocally contemplates an indefinite term of commitment, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof.

Instead of annual re-commitment proceedings, Wash. Rev. Code 71.09 provides only for show cause hearings, where the trial court determines whether "probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is not likely to engage in predatory acts of sexual violence if conditionally released to a less restrictive alternative or unconditionally discharged." Wash. Rev. Code 71.09.090(2). The show cause hearing is a "summary proceeding" in which the State need not comply with the rules of evidence and the detainee has no right to be present. *Id. Petersen.* There is no right to appeal. *Petersen,*

[36] The Washington Supreme Court wrote that this Court was "simply wrong" in its construction of the annual review provisions in the Kansas statute. *Detention of Petersen*, 138 Wn.2d 70, 79, 980 P.2d 1204 (1999). But whether or not the Kansas statute says what this Court said it does, the fact remains that this Court relied on the perceived annual re-commitment provision as a significant factor in finding the statute constitutional. The Washington court's purported reliance on *Hendricks* to uphold the Washington statute is thus predicated on its disagreement with *Hendricks*. This disagreement undermines the Washington decision, not the importance of an annual re-commitment requirement.

supra. Only upon failure to meet this low "probable cause" standard is the State required to re-prove its case beyond a reasonable doubt. *Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999).[37]

Wash. Rev. Code 71.09 lacks the procedural safeguards of the Kansas statute as interpreted by this Court. This Court's approval of the Kansas statute in *Hendricks* is thus inapplicable to the case at hand.

b. The review procedures in Wash. Rev. Code 71.09 are a "sham" demonstrating the punitive intent of the statute.

In his dissent in *Foucha v. Louisiana, supra*, 504 U.S. at 115, n.10, Justice Thomas noted:

> Foucha has not argued that the State's procedures, *as applied*, are a sham. This would be a different case if Foucha had established that the statutory mechanisms for release were nothing more than window-dressing, and that the State in fact confined insanity acquittees indefinitely without meaningful opportunity for review and release.

(Emphasis added.) Justice Kennedy, concurring in *Hendricks*, echoed Justice Thomas' concerns:

> If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish.

521 U.S. at 371. The Washington mechanisms for release are nothing more than window-dressing.

Wash. Rev. Code 71.09.092 was enacted in 1995 partly in response to the Washington Supreme Court's directive in

[37] The court in *Petersen* found that the statute placed the burden at the show cause hearing on the committed person. In *Detention of Turay*, the court held that the burden must rest on the State. It did not, however, suggest any change in the statutory language.

Detention of Young, *supra*, that the State provide less restrictive alternatives to total confinement at SCC. *See Young*, *supra*, 122 Wn. 2d at 47.Unfortunately, Wash. Rev. Code 71.09.092 makes it nearly impossible to qualify for a less restrictive alternative absent the active assistance of the State. It states:

> Before the court may enter an order directing conditional release to a less restrictive alternative, it must find the following: (1) The person will be treated by a treatment provider who is qualified to provide such treatment in the state of Washington under chapter 18. 1555 Wash. Rev. Code; (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for such treatment and will report progress to the court on a regular basis, and will report violations immediately . . . ; (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately report to the court . . . if the person leaves the housing to which he or she has been assigned without authorization; (4) the person is willing to comply with the treatment provider and all requirements imposed by the treatment provider and by the court; and (5) the person is willing to comply with supervision requirements imposed by the department of corrections.

The new legislation provides no mechanism for establishing less restrictive alternatives, and allows either the court or the DOC to overrule a jury verdict in favor of conditional release. It requires conditionally released residents to obtain treatment from certified Sexual Offender Treatment Providers (as defined in Wash. Rev. Code 18.155), even while SCC residents are still denied access to certified providers. JA-89. Those who are considered so dangerous that they must be treated in custody are denied the most expert assistance. Those who are amenable to be in the community cannot be

released until they find in the community what they were denied in the institution. Those in need of the most help are denied the most qualified helpers. Clearly, the legislature deems certification of treatment providers necessary not for treatment purposes, but only to deny meaningful access to less restrictive alternatives.

The review provisions of Wash. Rev. Code 71.09 are thus a sham, leaving committed persons "without meaningful opportunity for review and release." *Foucha*, (Thomas, J., dissenting), *supra*. The Statute is unconstitutional.

3. Washington has not "directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed"

In *Hendricks*, this Court found it "significant" that the detainees were "placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services." *Id.* at 519. Unlike the statute in *Hendricks*, Wash. Rev. Code 71.09.028 grants DOC control over all conditionally released persons. The legislature could have assigned mental health case managers to supervise conditionally released SCC residents. Instead, it chose to use an agency whose statutory charter is to punish offenders. Wash. Rev. Code 72.09.010.[38]

The Statute prohibits even the building of a secure "state mental hospital" for 71.09 detainees, leaving the Department of Social and Health Services with no alternative to placing

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[38] The statute reads in pertinent part:

> It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators. . . . (2) The system should punish the offender for violating the laws of the state of Washington.

71.09 detainees in a prison facility. If they ever are released, it is to the control of DCC.

(12) 42 U.S.C. 1983 is an Inadequate Remedy for Mr. Young's Incarceration under an Unconstitutional Statute.

By claiming that an action under 42 U.S.C. 1983, rather than habeas corpus, is the appropriate remedy, the State misapprehends the crux of both the Ninth's Circuit's opinion and Mr. Young's argument: that the punitive application of the Statute renders the Statute itself unconstitutional.[39]

In *Reno v. Flores, supra*, the Court found "no evidence . . . that habeas corpus [was] insufficient to remedy particular abuses" of the challenged regulation. The State does not explain how the remedy explicitly recommended for detained immigrants in *Flores* could be inappropriate for a detained civil commitment respondent in the case at hand.

Mr. Young challenges the validity of his detention under a statute which has proven unconstitutional in effect. Habeas is the appropriate remedy. *See, Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

The State's own actions betray the inadequacy of 42 U.S.C. 1983 as a remedy for Mr. Young. The Hon. William Dwyer entered his injunction in *Turay v. Weston* on June 6, 1994. JA-64 et.seq. More than five years after the injunction, the State itself acknowledged "that the minimum professional standards for treating sex offenders were not yet fully met and that the goal of providing constitutionally adequate mental health treatment was still unattained." Lodging of Petitioner at 8. The court held that the record showed "footdragging which has continued for an unconscionable time" and that

[39] In *Yick Wo*, for instance, this Court did not merely demand equal treatment for white and Chinese laundrymen. Upon finding the law discriminatory in effect, this Court struck down the law.

"the defendants have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction's requirements." *Id.* at 18. Judge Dwyer held the State in contempt. *Id.* at 20. The State has appealed both the contempt order and an earlier intermediate order continuing the injunction. (See, Order Denying, JA-140.)

The effectiveness of a 42 U.S.C. Sec. 1983 judgment is limited by the State's willingness to comply with injunctive relief and readiness to absorb financial loss as the price of non-compliance. The Sharp plaintiffs were each awarded $10,000 damages (totaling $150,000). The state paid $250,000 in attorney fees in 1998, and the case is still ongoing. Pet. Lodging, Order-6. The detainees nonetheless remain unconstitutionally incarcerated under punitive conditions under a punitive law. Habeas corpus is the only adequate remedy in the face of the State's intransigence.

(13) The Facial Validity of the Washington Statute and the Imprecision of 'Mental Abnormality' Are Fairly Comprised By the Question Presented

While the facial validity of Washington's statute and the implementation of "mental abnormality" are not outlined in the questions presented by the state in its petition for certiorari, they are "fairly comprised" by the question presented. *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). In addition, the state argues at length that the statute is constitutional on its face, and claims that "it is not disputed". Pet. Br. 15 et. seq. Mr. Young does in fact dispute this claim.

CONCLUSION

This case concerns not only the failure of the state of Washington to provide adequate treatment for nearly ten

years. It also concerns the purpose and effect of the "predator" statute as evidenced by the failure to provide treatment, by the deliberate incarceration of Mr. Young in a prison, with fewer rights and opportunities than when he was a sentenced criminal prisoner, by the systemic verbal abuse toward Mr. Young by "treatment" staff in the first few years of the program, by the legislature's refusal to improve the situation at the SCC, and by the application of the law to people who have volitional control, such as Mr. Young. Unlike what the Court found to be the case in Kansas, Mr. Young has not enjoyed the same conditions of confinement, opportunities for treat-ment, or opportunities to engage with family and friends in the community that a civilly committed mentally ill person enjoys.

The Court of Appeals correctly remanded this case for an evidentiary hearing to determine whether Mr. Young could show by "the clearest proof" that the Washington "predator" law is unconstitutionally punitive in purpose and effect. This Court could find the statute unconstitutional based on the record herein, without the necessity of remand. At a minimum, this Court should affirm the Court of Appeals' order remanding this case for an evidentiary hearing regarding the punitive nature of Mr. Young's nearly decade-long incarceration.

Respectfully submitted,

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